A

PP

v.

BERNADITO L ALENJANDRI JR

B HIGH COURT SABAH & SARAWAK, SANDAKAN
LEE HENG CHEONG JC
[CRIMINAL TRIAL NO: S45-04-2011]
11 JULY 2012

C ***CRIMINAL LAW:*** *Murder - Defence - Whether accused had necessary mens rea or intention to stab deceased - Whether accused raised reasonable doubt on charge - Whether safe to convict accused under s. 302 Penal Code - Penal Code, ss. 302, 304(a)*

D ***CRIMINAL LAW:*** *Voluntarily causing hurt - Elements of offence - Whether satisfied - Whether evidence against accused was challenged - Penal Code, s. 324*

The accused was charged under ss. 302 and 324 of the Penal Code ('Code') for the offences of murdering ('the first charge') E one Renato S Harder ('the deceased') and voluntarily causing hurt ('the second charge') to one James Jimeno ('PW5'). The facts showed that the accused reprimanded his wife upon seeing one Aling touching his wife, while they were at a birthday party of a colleague, Joel. Subsequently, whilst having drinks with his friends, F Aling approached the accused and hit his head, and Aling was joined by others who also punched, kicked and hit the accused. The accused managed to escape and ran back home and headed back to Joel's house with a *parang*. It was the case of the accused that, when he reached the entrance of Joel's house, he was hit at G the back of his head by someone and as a result he stumbled. It was the accused's further contention that, in the course of falling down towards the direction of the deceased who was standing in front of him, the parang which he held in his right hand struck the deceased and fatally injured him. The accused averred that it H was not his intention to stab the deceased. The question before the court was whether the accused had raised a reasonable doubt on the charges preferred against him.

Held (convicting accused on culpable homicide not I **amounting to murder and voluntarily causing hurt):**

(1) The accused's line of defence was corroborated by the medical report and in the absence of any other medical evidence to the contrary, this supported the evidence of the

accused that he was hit at the back of his head before he stumbled and fell. The former statement by the accused had strengthened the defence's story that the accused was hit at the back of his head before he stumbled and the weapon he held in his hand landed towards the direction of the deceased. (paras 13 & 15)

(2) There was indeed doubt as to how the deceased was stabbed which was a very important fact to consider in determining the state of mind or *mens rea* of the accused when the incident happened. The most favourable version should be drawn in favour of the accused. The pathologist's evidence on the nature of the wound corroborated with that of the accused's version. The place of the incident was a small cubicle and given the accused's height, it was difficult to conclude that the said fatal wound could be inflicted with intention. In this light, the accused was at all probability not liable for murder under any of the clauses of s. 300 of the Code and hence it was not safe to convict the accused under s. 302 of the Code. (paras 26, 31-32 & 39)

(3) However, based on the facts and the circumstances of the present case, the accused had committed an offence under s. 304(a) of the Code. From the facts that the accused went back to his house and took a parang, it could be easily inferred that he had an intention to cause bodily injury which was sufficient in its ordinary course of nature to cause death and he did in fact cause a death. (paras 36 & 39)

(4) As for the second charge, the accused had failed to raise any reasonable doubt on the charge of voluntarily causing hurt to PW5 with a dangerous weapon, a parang. The accused had also failed to dispute or challenge PW5's evidence that the accused had attacked and caused the injury to him. (paras 37-38)

(5) The accused is sentenced to 18 years' imprisonment for the reduced first charge and 2 years' imprisonment for the second charge, which shall run concurrently. (para 40)

Case(s) referred to:

Chan Kwee Fong v. PP [2010] 3 CLJ 671 CA ***(refd)***

Karthiyayani & Anor v. Lee Leong Sin & Anor [1974] 1 LNS 61 FC ***(foll)***

Mohamad Radhi Yaacob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***

A *PP v. Megat Shahrizat Megat Shahrur [2011] 8 CLJ 893 FC* ***(refd)***
PP v. Soew Wei Hoong [2009] 1 LNS 1504 HC ***(foll)***
Tham Kai Yau & Ors v. PP [1976] 1 LNS 159 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 180(1)
B Penal Code, ss. 300, 302, 304(a), (b), 324

For the prosecution - Silanny; DPP
For the accused - Margaret Hon; M/s Margaret Hon & Con

Reported by Najib Tamby
C

JUDGMENT

Lee Heng Cheong JC:
D

Introduction

[1] The accused was charged with the murder of one Renato S Harder under s. 302 of Penal Code ("first charge") and with intentionally causing hurt to one James Jimeno, an offence under
E s. 324 of the Penal Code ("second charge").

[2] The charges preferred against the accused read as follows;

The First Charge

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> That you, on the 14th day of January 2011, at around 7.00pm to 8.00pm, at Kongsi Pekerja No. 15D, Ladang Mewah 2, in the District of Kinabatangan, in the State of Sabah, did committed murder by causing the death of one Renato S Harder (M) and thereby committed an offence punishable under s. 302 of the Penal
G Code.

The Second Charge

> That you, on the 14th day of January 2011, at around 7.00pm to 8.00pm, at Kongsi Pekerja No. 15D, Ladang Mewah 2, in the
H District of Kinabatangan, in the State of Sabah, had voluntarily caused hurt to one James Jimeno (M) by means of a sharp parang and that you have thereby committed an offence punishable under s. 324 of the Penal Code.

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The Element of the Charges

[3] The essential ingredients of the first charge which the prosecution must prove against the accused are thus:

(a) that Renato S Harder ("the deceased") is dead;

(b) that his death was caused by injuries sustained by him;

(c) that his death was caused by or in consequence of the act of the accused;

(d) in inflicting the injuries upon the deceased persons, the accused person either:

(i) caused them with the intention of causing death; or

(ii) caused them with the intention of causing such bodily injuries as the accused persons knew to be likely to cause death; or

(iii) caused them with the intention of causing such bodily injuries and such injuries were sufficient in the ordinary cause of nature to cause death.

[4] As for the second charge, the essential ingredients of the offence are that the accused:

(a) voluntarily caused hurt to James Jimeno;

(b) used a sharp weapon to do so; and

(c) that s. 335 of the Code did not apply to the case.

At the End of the Prosecution's Case

[5] At the end of the prosecution's case, the court on 20 February 2012 ruled that the prosecution had made out a *prima facie* case against the accused for both charges and had ordered for defence to be entered as provided for under s. 180(1) of the Criminal Procedure Code.

[6] The court made such decision based on the following reasons:

(a) The deceased is dead. The deceased's body had been positively identified by his sister (PW10) during the post-mortem. She had also lodged a police report (exh. P69) to correct the real name of the deceased as Renato S Harder.

(b) Dr Jessie Hiu @ Jessie Dorey Hiu Chen Chen (PW6), the pathologist, testified that the deceased's death was caused by the hypovolaemic shock due to or as a consequence of chop wound on the neck. Besides her oral testimonies, her evidence is corroborated by the post-mortem report which was admitted and marked as exh. P7. Hence, the death of the deceased was caused by injuries inflicted on him.

(c) There is sufficient evidence to show that the deceased's death was caused by the injuries inflicted by the accused namely:

(i) Alfredo Barlaan (PW11), saw the accused slashed the deceased on his left neck with parang. James Jimeno, PW5 also witnessed the incident and was injured during the incident.

(ii) The parang (P10) who is undisputedly the weapon used in this case was discovered from the accused by Jumal Sakile (PW12) who later handed it to his wife. The parang later discovered by one Hendrik Dadi (PW14) who put it at the bucket of bucket of the vehicle, which later seized by PW16, Sjn Ismail.

(iii) The t-shirt (P61) which was discovered from the information given by the accused was sent to the Chemistry Department for DNA profiling and according to Rita Tie Ung Ha (PW7), the chemist and her report (P22) contained the bloodstained that belonged to the deceased.

(d) There is evidence to show that the accused had the intention to cause the deceased bodily injury which was sufficient in the ordinary course of nature to cause death.

[7] Having subjected the prosecution's case to a maximum evaluation, the court also ruled that the prosecution had succeeded in proving a *prima facie* case against the accused on the second charge of voluntarily causing hurt to one, James Jimeno with dangerous weapon ie, the parang. James Jimeno was called to testify and he testified that the accused after slashing the deceased had attacked him and caused the injury to him. His testimony had been corroborated by Dr Prem Kumar, (PW8) who had attended to him and the accused, and further corroborated by PW8's report (P63).

The Defence Case

[8] In the defence trial, the accused opted to give evidence on oath from the witness dock and also called his wife to testify.

[9] For the accused to earn an acquittal, the issue for the court's determination is whether the defence version of explanation to the charges preferred is capable of belief in that it is true or reasonable or alternatively it succeeds in creating a reasonable doubt in the prosecution's case. Further, the duty of the defence is merely to cast a reasonable doubt on the prosecution's case. (see *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311)

[10] The evidence of the accused can be summarised as follows:

(a) The accused (DW1) in his evidence stated that since 2009, he and his wife (DW2) had started to work at Mewah 2 estate where the incident took place until the time of the present incident occurred. The accused and his wife were staying at the estate's quarters.

(b) On the day of the incident, he and his wife were invited by Joel Mateo (the accused's colleague, henceforth called Joel) to attend the latter's birthday party at his house which was located opposite the accused's house.

(c) The accused and his wife went to Joel's house in the early morning of the incident where his wife helped up in the cooking of the birthday feast and he, together with the host and Fredo went to the village areas to look for chickens but in vain and later they met one Tagalog male who gave them two chickens to off-set his debt that he owed Joel.

(d) They then brought back the two chickens and slaughtered and cooked them at Joel's house. After having cooked the chickens, they ie, Eduardo, Dimar, Alfredo, Eric, Joel and Jimmy ate together and drank a local alcoholic drink known as 'Mantako' at Joel's house. At about 12 noon time, the accused went back home to rest.

(e) In the evening on the same day, the accused's wife at the request of Joel, came to call the accused to go to Joel's house to continue to drink. The accused obliged. When the accused reached Joel's house, he saw many guests were there and they included Aling, David, James Jimeno, Eric, Joel, Alfredo, Eduardo, two Bugis men.

(f) As the alcoholic drinks was almost finished, all of them agreed to take a box of Mantako, on credit from a kampong tuck shop.

(g) In the midst of partying, the accused saw Aling held his wife by her shoulder at the verandah of Joel's house and the accused left the party and proceeded to verandah to reprimand his wife for allowing Aling to do so as he felt embarrassed. The accused then wanted to bring his wife home and they went out but was deterred by heavy rain at that moment.

(h) Not long later, Joel came out to the verandah to invite the accused to go into the house, to continue with the drinking and the accused obliged. Having returned to the party inside Joel's house, he saw Aling was also there and seated near to the entrance door, so the accused took the seat next to Aling but Aling stood up at once and went to the kitchen of the house. The accused expressed his dissatisfaction about the incident of Aling holding his wife and asked Joel, the host to advise Aling, not to do so as the accused was embarrassed by Aling's conduct. Joel agreed to advise him.

(i) While the accused and Joel were talking and drinking in the sitting area, Aling emerged from kitchen of the house and joined them to continue to drink and apologised to him and the accused said it was lucky for Aling to do to his wife, and if others, he did not know what would happen to Aling and that perhaps a fight may ensue. Suddenly, Aling stood up and said to the accused, that if he is angry then continued to be angry and followed by hitting the accused on his head with something made of glass. The accused then tried to stand up but he was deterred by Renato (the deceased) who pulled the accused's shirt from behind and Renato also punched him on his back. At the same time, the accused also being rained by punches, kicks and hits from undetermined persons as the accused was too weak to defend and/or to identify who were the assailants, due to the said attack.

(j) At this juncture, the accused's wife came into his help and with the assistance of her help, he managed to stand up and he straight away ran back home. As a result of the attack, the accused sustained injuries and his t-shirt was torn with bloodstains.

(k) Having reached home, the accused looked for wooden stick but he could not find one instead he took a parang which he used in his daily work at the estate and ran back to Joel's house to look for Aling.

(l) He took the route of going back to Joel's house by climbing the staircase in front of the said house by holding the parang in his right hand at his chest level.

(m) Meanwhile, after the accused left for his house and before he returned to Joel's house, according to James Jimeno (PW5)(Q240 on p. 36 NOP), Aling ran away from Joel's house and had never since returned to Joel's house. Only James Jimeno (PW5), Alfredo Barlaan (PW11) and Renato (the deceased) were inside the house, at that material time.

(n) The accused's wife was at the verandah of Joel's house outside the entrance door. She shouted as she saw the accused climbing the staircase infront of Joel's house armed with a parang. Her shout was also heard by James Jimeno (PW5)(Q 251-253 on p. 37 NOP).

(o) The accused's wife in her evidence confirmed that she shouted for help when the accused was at the staircase of Joel's house and she was standing beside the entrance door of Joel's house. (Please see Q1710-1713 on pp. 265-266 NOP).

(p) When the accused reached the entrance door of Joel's house, he saw that Renato (deceased) was standing near to the wall and facing him, challenged him to enter by saying "Kalau kamu berani, kamu masuklah". Despite the challenge made by Renato, the accused said he nevertheless entered the house as he wanted to look for Aling for revenge as Aling had bashed him up seriously until he fell on the floor.

(q) According to the accused, when he entered the house, Renato was not singing karaoke as described by James Jimeno (PW5) and Alfredo Barlaan (PW11) but he was in a standing position and facing the accused who was at the entrance door.

(r) The accused was holding a parang in his right hand and when he entered into Joel's house by the entrance door, someone punched him at the back of his head, the accused immediately wielded his parang towards the direction of James Jimeno (as James Jimeno was at the accused's right hand side and towards the rear of accused) and as the accused stumbled as

a direct result of being hit at the back portion of his head, he fell infront of Renato who was standing there. As he fell, his parang landed in the direction of Renato.

(s) He also said he saw Renato holding a cock-fighting spur/knife on his hand. The accused claimed that he neither deliberately nor has any intention at all to stab Renato as he felt 'pening' when his head was hit. During the incident, the accused did not know that his parang had hit James Jimeno and killed Renato. He was only informed by police when he was in the police station, to record his statement, that James Jimeno was hit by his parang and only after the incident, at the office of Ladang Mewah 2, that he knew that he stabbed Renato.

(t) The accused also said he did not know which part of Renato's body did he stab. The accused in court, also demonstrated his body position - face down, when he fell to the floor. DW2 also in her evidence said she entered into Joel's house after her husband entered and she found her husband was lying on the floor in the position of face down. She then quickly left the said house to get the assistance of security guards.

(u) After the accused have fallen down, he then stood up and went to the kitchen of Joel's house to look for Aling but in vain. He then asked a Bugis male who stayed next door to Joel, the whereabout of Aling and the said Bugis male said he did not see Aling.

(v) The accused then picked up an iron pipe at the kitchen to defend himself in case he was attacked by others. The accused then let go of his parang and iron pipe to two persons who were near to him and went back home.

(w) Having came back to his house, the accused washed his bloodied face and changed his clothings. After that he sat down and puffed his cigarette. He then wanted to surrender to the office of Ladang Mewah 2 but he was stopped from doing so by people there including some Timorist who threw stones at him, causing him to return to his house and later with the assistance of Augustinus, he managed to give up to the authority.

Findings Of The Court

Whether The Defence Has Raised Reasonable Doubt On The First Charge

[11] The question now is whether the accused had raised reasonable doubt on the first charge preferred against him.

Consistency Of The Accused's Evidence

[12] Besides the oral evidences of DW1 and DW2, the defence also tendered the written statement of DW1 to show consistency of evidence of the accused.

[13] I noted that the accused's line of defence was also corroborated by the medical report of the DW1 (marked as P62) where multiple abrasion were noted on the scalp of the accused. Hence, in the absence of any other medical evidence to the contrary, this goes to support the evidence of DW1 that he was hit at the back of his head moment before he stumbled and fell.

[14] The consistency of defence story from beginning till the end of case, lent credence to the defence's case. On this I find support from the case of *Karthiyayani & Anor v. Lee Leong Sin & Anor* [1974] 1 LNS 61 where it was held that the former statement of a witness is admissible to corroborate him if it is consistent with the evidence given by him in court.

[15] Having perused and considered the accused's former statement and his medical report in exh. P62, I find that the accused's former statement had added or strengthened the defence's story that the accused was hit at the back of his head before he stumbled and the knife he held in his hand, landed towards the direction of the deceased.

How The Deceased Was Slashed

[16] There were two versions on how the deceased was slashed. The prosecution witnesses *ie*, PW5 and PW11 said the accused came into the house and straight away slashed the deceased who was holding a microphone singing karaoke. On the other hand, the accused said (as he demonstrated in court) he was hit at the back of his head by someone and as a result of the said hit he stumbled and in the course of falling down towards the direction of the deceased who was standing in front of him, he waved his parang which he held in his right hand at the chest level towards his right hand side, turning to his back and lastly chopped to his front and followed with his fall with face down.

[17] At this juncture, it is best to get assistance from the case of *PP v. Soew Wei Hoong* [2009] 1 LNS 1504 where David Wong J has held that the court has a duty not only to see whether the accused had raised a reasonable doubt in the prosecution's case, the law also requires the court to re-evaluate all the evidence of the prosecution and defence and ask itself whether the prosecution had proven its case beyond reasonable doubt. This rationale for the position of the law is that the burden to prove its case remains throughout the trial on the prosecution and there is no duty at all on the accused to prove his or her innocence.

[18] Further, in the Supreme Court case of *Mohamad Radhi Yaacob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 Mohd Azmi FCJ held that:

> ... We are of the view that whenever a criminal case is decided on the basis of the truth of the prosecution case as against the falsity of the defence story, a trial judge must in accordance with the principle laid down in *Mat v. PP* [1963] 1 LNS 82 go one step further before convicting the accused by giving due consideration as to why the defence story though could not be believed did not raise a reasonable doubt on the prosecution case. Thus, even though a Judge does not accept or believe the accused explanation, the accused must not be convicted until the court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt on the prosecution case.

[19] Reverting back to the facts of the present case, due regards must be had to the circumstances of the case where the space in which the incident took place, was a small confined area measuring about 137" X 91" (11'5" X 7'7") which is about 80 square feet in total. Deducting the space taken up by the karaoke set and TV rack, the balance is surely lesser than 80 square feet. Besides that reference has to be made to the distance between the entrance door to opposite wall in the sitting area is 91" (7'7"), so by the height of the accused who is about 5 feet 7 inches, coupled with the knife he held on his right hand at chest level, it is likely that he may reach the deceased by his neck, following what he said in his evidence. So, it is most likely that what he said probably is true.

[20] Further and in addition, the deceased's fatal wound was found on the left side of his neck and following the location where the karaoke and TV rack were placed as appeared in sketch plan P72, it is not likely that he was slashed when he was in the position of singing, be it in the position of where Eric Gudoy said

or the accused said. This is simply because when one sings, one faces the TV screen, to look the TV screen and that being the case, in order for the accused to inflict the fatal blow, he has to go in front of the deceased, to chop him when viewed from the circumstances of the case, is totally unlikely.

[21] Besides that, it is unlikely that the deceased was still singing when the accused's wife was shouting at the door step, on seeing the accused climbing up the staircase in front of the place of incident with a parang. Obviously, her shout should have alerted all of them in the sitting area of the house including the deceased. In fact, this fact is true as it was not only mentioned by DW2 but it was also confirmed by PW5 where he said that the accused's wife was crying to stop the accused from entering the house. (Refer to Q 251 on p. 37 NOP). PW5 not only heard the cry but he also saw what the accused responded to his wife's cry.

[22] Since, PW5 not only could hear but also see the cry of the accused's wife, it is doubtful that the deceased would still continue to sing karaoke. So, there is reasonable doubt that when the deceased was slashed by the accused, he was definitely not singing karaoke.

[23] PW16, the assistant investigating officer confirmed in his evidence that on the night of incident, he interviewed one Eric Gudoy who was at the scene of crime when the incident took place (Q 1431 on p. 216 NOP). Eric Gudoy did not tell him that when the deceased was slashed, he was holding a microphone and singing karaoke which caused PW16, not to emphasise on microphone and karaoke set. (Refer to Q 1432 on p. 216 NOP). In other words, the testimonies of PW5 and PW11 that the deceased held on to a microphone and was singing karaoke at the time he was slashed by the accused, is not likely to be true since Eric Gudoy said otherwise and in the circumstances of the case. The prosecution failed to call the said Eric Gudoy to clarify and explain this material contradiction, thus it has to be resolved in favour of the defence. Though Eric Gudoy was offered to the defence, they could not relieve their bounden duty by so doing as their duty to prove the charge beyond reasonable doubt and could not be shifted to the defence.

[24] Besides that, at the time of incident the deceased was not likely to be singing karaoke as some of the guests had left, including Aling. This took place after the accused ran back to his house and before he came back with parang, (see evidence of

PW11 at Q 910 on p. 136 NOP) perhaps anticipating that the accused may return to look for trouble. Since some of the guests had left the scene of crime including Aling, anticipating that trouble may crop up, it is not probable in that circumstances, the deceased would still be singing karaoke.

[25] The evidence of prosecution (sketch plan P72) showed that, the deceased was standing on the mark "X" in black colour as the mark made by PW16 which he obtained from one Eric Gudoy indicating the location of the deceased when he was slashed by the accused but the said Eric Gudoy was not called by the prosecution to testify. However, it was doubted by defense that, that could not likely be the position of where the deceased was slashed simply because the wall behind him has no single droplet of bloodstain found, given the neck wound sustained by the deceased was big (9 cm long and 7 cm depth) and the jugular vein was completely cut resulting in severe bleeding (refer to PW6's evidence at Q405 on p. 58 NOP).

[26] As such, there is indeed a reasonable doubt as to how the deceased was stabbed which is a very important fact to be considered, to determine the state of mind or *mens rea* of the accused when the incident happened. Based on the above findings, the most favourable version should be drawn in favour of the accused.

Credibility Of The Witnesses

[27] I have observed the demeanour and veracity of the witnesses for the prosecution and the defence. I prefer the testimony of the accused and his wife. The accused testified in a straightforward manner and I find that his testimony was credible and capable of belief. As regards the testimonies of the prosecution witnesses especially PW5 and PW11, I find that their testimonies are not credible based on other circumstances and evidences of the case and they being friends of the deceased, might not tell the truth and instead seek to implicate the accused in the death of their friend, the deceased.

Intention To Commit The First Charge

[28] The offence of murder requires the intention to cause death or to cause such bodily injury as the accused knew is likely or sufficient to cause death.

[29] The Court of Appeal in *Chan Kwee Fong v. PP* [2010] 3 CLJ 671 held that the circumstances of the case had to be looked into and examined to determine how the fatal injury was inflicted to infer intention of the accused. This was held: A

> ... If [section 300(c) of the Penal Code] states that the accused intended to cause bodily injury and that 'bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.' We would gratefully apply the test laid down by V. Bose J, in *Virsa Singh v. State of Punjab* AIR 1958 SC 465 at p. 467, and there His Lordship said: B C
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> > In considering whether the intention was to inflict the injury found to have been inflicted, the enquiry necessarily proceeds on broad lines as, for eg, **whether there was an intention to strike at a vital or a dangerous spot**, and whether with sufficient force to cause the kind of injury found to have been inflicted. It is, of course, not necessary to enquire into every last detail as, for instance, whether the prisoner intended to have the bowels fall out, or whether he intended to penetrate the liver or the kidneys or the heart. Otherwise a man who has no knowledge of anatomy could never be convicted, for, if he does not know that there is a heart or kidney or bowels, he cannot be said to have intended to injure them. Of course, that is not the kind of enquiry. It is broad-based and simple and based on common sense : the kind of enquiry that 'twelve good men and true' could readily appreciate and understand. (emphasis added)] D E F

[30] Applying the above said authority, the court has to look into the circumstances of the case to determine the fatal injury was inflicted to infer intention of the accused. On the facts of the instant case, there was only one injury, caused by the accused slashing towards the deceased. According to the demonstration performed by the accused in court, the accused stated that as he stumbled and fell as a result of someone hitting his head from behind, he instinctively slashed his parang against the assailant who hit his head from behind him and following his body felling and moving forward to the direction of the deceased who was standing in front of him with his parang swung from up down towards on the deceased which struck the deceased. G H

[31] Viewing the nature of the wound on the deceased, the pathologist PW6 expressed her opinion and stated that the wound was a chop wound on the left side of the neck of the deceased directed downward. (Refer Q 404 on p. 57 NOP). Her evidence seemed to corroborate the accused's version of the material events. I

[32] Besides that, the place of incident was a small cubicle and given the height of the accused, it is difficult for one to conclude that the said fatal wound could be inflicted with intention. Therefore, in the light of the present circumstances, the accused is at all probability not liable for murder under any of the clauses of s. 300 of the Penal Code.

[33] Based on the facts of the case, the swinging of the parang by the accused towards the direction of the deceased was not caused by his own free will but due to his involuntary fall which was caused by someone, hitting him hard on the back of his head. Hence, the accused is not liable to murder in the circumstances of this case.

[34] Since the charge of murder could not be made out, I shall consider whether culpable homicide pursuant to s. 304(a) or 304(b) of the Penal Code could be made out in the facts and circumstances of the instant case?

[35] It is to be noted that s. 304(a) requires intention to cause death or such bodily injury as is likely to cause death - a thin distinction with the s. 300 Penal Code. According to the Federal Court in *PP v. Megat Shahrizat Megat Shahrur* [2011] 8 CLJ 893 quoted the case of *Tham Kai Yau & Ors v. PP* [1976] 1 LNS 159 held that whether the offence is culpable homicide or murder depends upon the degree of risk to human life. If death is the likely result, it is culpable homicide, if it (death) is the most probable result, it is murder. Illustration (d) of s. 300 Penal Code is a case of this description.

[36] On the facts of the present case adumbrated above and based on the circumstances of the case, I am satisfied that an offence under s. 304(a) had been committed by the accused as the fact that accused went back to his house and took a parang instead of other items, can be easily inferred that he had an intention to cause bodily injury which was sufficient in its ordinary course of nature to cause death and he did in fact cause death.

Whether The Accused Had Raised Reasonable Doubt On The Second Charge

[37] As for the second charge, the accused had failed in raising any reasonable doubt on the charge of voluntarily causing hurt to one James Jimeno with dangerous weapon ie, the parang.

[38] The accused had also failed to dispute or challenge the evidence of the victim James Jimeno who testified that the accused had attacked him and caused the injury to him.

Conclusion

[39] From the evidence led by the prosecution and the evidence of the accused, the other witnesses for the defence, I find it is not safe for this court to convict the accused under s. 302 of the Penal Code. There are sufficient reasonable doubts on the guilt of the accused as resented by the prosecution. However, there are enough evidence to prove that the accused had committed an offence under s. 304(a) of the Penal Code.

[40] Hence, the accused is convicted on a reduced charge under s. 304(a) of the Penal Code and is sentenced to 18 years' imprisonment with effect from the date of his detention (15 January 2011). As regards the charge under s. 324 PC, the accused is sentenced to imprisonment of two years, which shall run concurrently with the sentence imposed under s. 304(a) of the Penal Code above.